IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 54 OF 2007

Mr. Hanif Chaudhari,
major in age, r/o Conal Waddo,
Maina, Pilerna, H.No. Not known,
Bardez, Goa. .... Applicant

V/s.

1. Thunderwave Waters Sports,
a Partnership firm, registered under
the Partnership Act, represented by
its Partner Shri Peter D'Souza,
r/o. H.No. 261-A, Dando,
Candolim, Bardez, Goa.

2. S T A T E through
the Public Prosecutor,
High Court, Panaji,Goa. .... Respondents

Mr. S.G. Bhobe, Advocate for the Petitioner.
Mr. V.A. Lawande, Advocate for the Respondents.

Coram : N.A. Britto, J.

Date : 11th OCTOBER, 2007

ORAL JUDGMENT :

Admit. By consent heard forthwith.

2 This revision petition is filed by the accused who was discharged at the stage of Sections 245/246 of the Code of Criminal Procedure, 1973 by the learned JMFC by order dated 21/07/2005 and which order has now been reversed by the learned Sessions Judge, by his order dated 13/07/2007.

3. The complainant had prosecuted the accused under Section 420 I.P.C. The case of complainant was that the complainant was dealing with the business of water sports in the name and style of Thunderwave Water Sports and the accused was the complainant's seasonal worker for the months of October to May and that in the month of August, 2001, the accused approached the complainant to advance to the accused a sum of Rs. 39,300/- as a loan with a promise to repay the same in instalments of Rs. 1,000/- during the working months of the following seasons which would commence from October, 2001 onwards.

4. As per the complainant, at the time of making the promise, the intention of the accused was dishonest and the accused dishonestly represented to the complainant that he would repay the amount through his salary from working seasons, induced the complainant to believe that he would work with the complainant and thereby the complainant would be entitled to recover the loan amount after deducting the loan amount every month from the salary of the accused. But the accused absconded and could not be traced despite the efforts of the complainant to search the accused. The case of the complainant was that the accused had dishonest intention to deceive the complainant by cheating him for the money received in order not to pay the same by working for the complainant.

5. After the process was issued the accused appeared before the Court and thereafter the inquiry followed wherein the complainant examined himself and two more witnesses and produced the writing signed by the accused. Moses Menezes/PW3 is a witness who wrote down the said writing and confirmed the said fact in his evidence before the Court. Gregorio Fernandes/PW2 signed as a witness to the said writing and confirmed the said fact in his evidence before the Court. The complainant in addition to deposing as regards the execution of the said writing by which the accused had taken the said advance of Rs. 39,300/- on 4/08/2000, further stated that there was an understanding between them that the accused would work for the complainant during the working season and the complainant would deduct a sum of Rs. 1,000/- per month and the said understanding was reduced in writing in the presence of the said Gregorio Fernandes/PW2.

6. The learned trial Court by order dated 21/07/2005 came to the conclusion that it was not mentioned in writing that the accused had agreed to work for the complainant and therefore the ingredients of Section 420 IPC were not attracted. The learned Magistrate also held that the dispute between the complainant and the accused was purely of civil nature and the complainant had a remedy of filing a civil suit for recovering the loan.

7. In the revision filed by the complainant, the learned Sessions Judge

noted and in my view rightly, that the accused could be discharged only in case the charge was found to be groundless. The learned Sessions Judge referred to the said writing - Exhibit PW1/A and stated that it mentioned that the accused would pay the amount during the working months of the season and therefore the question was as to how without working during the said months of the season the accused would pay the said amount and it had to be kept in mind that prior to deducting the said loan the accused was working for the complainant during the said season and therefore there was prima facie evidence of dishonest intention of the accused and therefore charge had to be framed under Section 420 IPC.

8. Counsel on behalf of the accused contends that it is nowhere the case of the complainant, either in the complaint or in the evidence of the complainant, that the complainant believing the statement made by the accused that the accused would work for the complainant and repay the money that the complainant had advanced the sum of Rs. 39,300/- and if at all the accused had taken the said advance the case between the complainant and the accused was of civil nature, notwithstanding the plea of the accused that the accused had not taken the said amount from the complainant and the complaint was filed against the accused only because the accused was now working for a competitor of the complainant. Learned Counsel on behalf of the accused therefore contends that this was not a case of deception but a case

of breach of contract for which the remedy available to the complainant was by way of a civil suit. Learned Counsel contending that the line between a case of cheating and a breach of contract is very thin, has referred to the case of ***Anil Mahajan V/s. Bhor Industries Ltd. and Anr. (2005 (10) SCC 228)***. In this case the Apex Court observed that mere failure of a person to keep up a promise subsequently, a culpable intention right at the beginning, that is, when he made the promises cannot be presumed. A distinction has to be kept in mind between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of inducement. The subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent, dishonest intention is shown at the beginning of the transaction. The Apex Court also observed that the substance of the complaint had to be seen. Mere use of the expression "cheating" in the complaint is of no consequence. The Apex Court in the above decision also referred to its decision in ***Alpic Finance Ltd. V/s. P. Sadasivan (2001 (3) SCC 513)***, wherein it was observed thus:

> "When somebody suffers injury to his person, property or reputation, he may have remedies both under civil and criminal law. The injury alleged may form the basis of civil claim and may also constitute the ingredients of some crime punishable under criminal law. When there is dispute between the parties arising out of a transaction involving passing of valuable properties between them, the aggrieved person may have a right to sue for damages or compensation and at the same time, law permits the victim to proceed against the wrongdoer for having committed an offence of criminal breach of trust or cheating. Here the main offence alleged by the appellant is that the respondents committed the offence under Section 420 IPC and the

> case of the appellant is that the respondents have cheated him and thereby dishonestly induced him to deliver property. To deceive is to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. It must also be shown that there existed a fraudulent and dishonest intention at the time of commission of the offence."

Learned Counsel has also referred to the case of ***Veer Prakash Sharma V/s. Anil Kumar Agarwal & Anr. (2007 ALL MR (Cri) 2618 S.C.)*** and to the case of ***Valmiki Faleiro V/s. Lauriana Fernandes e Diniz & Ors. (2005 ALL MR (Cri) 2509)*** as well as ***Captain Lance Irwin Lobo V/s. Ismail D'Souza @ Angelo Ismail de Souza & Anr. (2007 ALL MR (Cri) 623)*** which I have perused. In this last case it was observed that:

> "The recording of the statement on oath of the complainant under Section 200 Cr.P.C. is not an empty formality. Commonly it is nicknamed as verification. To verify means to establish the truth. In other words, verification is done in order to ascertain as to what is pleaded by the complainant is true or not. It is with a view to separate chaff from the grain as many a times complaints do contain unfounded allegations and it is the duty of the Court to ensure that what is stated in the complaint is also stated by the complainant on oath and it is only then that based on such statement that process can be issued. The corollary of this would be that unless offences are disclosed from the statement on oath, no process can be issued only based on averments in the complaint."

The above case is of no assistance to the case of the accused.

9. At the stage of framing of charge under Sections 245/246 what a Court is required to consider is whether there is a ground for presuming that the accused had committed offence triable under Chapter 29 of the said Code and not whether there is a ground for convicting the accused. The case is being argued on behalf of the accused as if the accused has been convicted at the

conclusion of trial. As regards this aspect the Apex Court in ***R.S. Nayak V/s. A.R. Antulay and Anr. (AIR 1986 SC 2045)*** has stated that the stage at which the Magistrate is required to consider the question of framing of charge under Section 245 (1) is a preliminary one and the test of "prima facie" case has to be applied and in case if the trial Court is satisfied that the prima facie case is made out, charge has to be framed. The expression 'ground' in the context of Section 245 is not a ground for conviction but a ground for putting the accused on trial and all that the Court is required to consider is whether the evidence, if generally accepted, would reasonably connect the accused with the crime. In other words, if the Court was to think that the accused might have committed the offence, it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. In the case at hand the complainant had produced the said writing and had examined himself and two other witnesses to prove the same and this had been prima facie proved that the complainant had lent to the accused the said amount of Rs. 39,300/- which the accused was required to repay at the rate of Rs. 1,000/- per month, during the working months of the season. The complainant as well as the complainant's witness Moses Menezes/PW3 had clearly stated that there was an understanding that the accused would work for the complainant and the complainant would deduct Rs. 1,000/- per month. The essence of Section 420 IPC is that the intention of the accused should be dishonest at the time when the promise is made and when money is parted based on the said promise. It

is also well settled that such dishonest intention cannot be inferred from the mere fact that the accused could not subsequently keep the promise. As far as the facts of this case are concerned, prima facie, it appears that the promise of the accused was dishonest in that inspite of having taken the said amount from the complainant on 4/08/2000 under a writing, the accused did not report for work in the month of October of that year nor any time thereafter till the complaint was filed nor repaid the said amount but on the contrary started working elsewhere, and according to the accused himself, with the competitor of the complainant. The complainant might have not used the words such as induced as used in Section 420 IPC, but the evidence led by the complainant and his witnesses alongwith the writing when read as a whole was more than sufficient to come to the prima facie conclusion that when the accused had taken the said loan the accused had no intention to report back and pay the loan advanced; by working for the complainant. It may be that the accused was a mere labourer but that by itself was insufficient to discharge the accused.

10. The order of the learned Additional Sessions Judge therefore could not be faulted. There is no merit in this revision. The same is hereby dismissed.

N.A. BRITTO, J.

NH/-